FILED
DEC 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-335 (0)

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

BARBARA L. HERWIG
GORDON W. DAIGER
LARRY L. GREGG
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

58 pp

QUESTIONS PRESENTED

1. Whether the collateral order doctrine permits an immediate appeal from an order denying a claim of qualified immunity in a damages suit against a public official on the ground that the legal standards allegedly violated were clearly established at the time in question.

2. Whether petitioner was entitled to qualified immunity in this case.

3. Whether the Attorney General is entitled to absolute immunity when he makes decisions in the area of national security.

PARTIES TO THE PROCEEDINGS

In addition to petitioner, the following parties were defendants in the district court: Richard G. Kleindienst, L. Patrick Gray III, Albert Cooper, and E. Davis Porter. Petitioner is the only remaining defendant. Respondent Keith Forsyth was the only plaintiff.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	8
Argument:	
I. Petitioner is entitled to qualified immunity under *Harlow* for authorizing warrantless domestic security wiretaps in 1970 and 1971	12
A. Denial of a qualified immunity claim in a *Bivens* suit is appealable under the collateral order doctrine	12
B. Petitioner did not violate a clearly established legal standard	27
II. Petitioner is entitled to absolute immunity for decisions made to protect national security	35
Conclusion	49

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651	9, 16, 19, 21, 22, 23, 24
Aptheker v. *Secretary of State*, 378 U.S. 500	43
Berger v. *New York*, 388 U.S. 41	28
Berger v. *United States*, 295 U.S. 78	34
Bever v. *Gilbertson*, 724 F.2d 1083, cert. denied, Nos. 84-25 and 83-2139 (Oct. 29, 1984)	26
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388	36
Brown Shoe Co. v. *United States*, 370 U.S. 294	13

Cases—Continued: Page

Burkhart v. *Saxbe*, 596 F. Supp. 96 ..... 4, 31
Bush v. *Lucas*, No. 81-469 (June 13, 1983) 36
Butz v. *Economou*, 438 U.S. 478 ..... *passim*
Carlson v. *Green*, 446 U.S. 14 36
Carroll v. *United States*, 354 U.S. 394 26
Carson v. *American Brands, Inc.*, 450 U.S. 79 13
Chagnon v. *Bell*, 642 F.2d 1248, cert. denied, 453 U.S. 911 ..... 24, 32
Chappell v. *Wallace*, No. 82-167 (June 13, 1983) .. 36, 41
Cobbledick v. *United States*, 309 U.S. 323 21
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 ..... 8, 9, 13, 18, 19, 20, 22, 23, 24
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 .... 19, 20, 26
Dandridge v. *Police Dep't*, 566 F. Supp. 152 39
Davis v. *Passman*, 442 U.S. 228 36
Davis v. *Scherer*, No. 83-490 (June 28, 1984) 15, 39
Dickinson v. *Petroleum Conversion Corp.*, 338 U.S. 507 ..... 13, 17
Dombrowski v. *Eastland*, 387 U.S. 82 16
Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 ..... 13, 19
England v. *Rockefeller*, No. 83-1851(L) (5th Cir. July 16, 1984) 26
Evans v. *Dillahunty*, 711 F.2d 828 22
Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 20
Flanagan v. *United States*, No. 82-374 (Feb. 21, 1984) 13, 18, 19, 20, 21
Gillespie v. *United States Steel Corp.*, 379 U.S. 148 ..... 13, 17, 19, 20
Gregoire v. *Biddle*, 177 F.2d 579, cert. denied, 399 U.S. 949 41
Haig v. *Agee*, 453 U.S. 280 43
Halkin v. *Helms*, 598 F.2d 1 43
Halperin v. *Kissinger*, 578 F. Supp. 231 44
Hanrahan v. *Hampton*, 446 U.S. 754 14
Harlow v. *Fitzgerald*, 457 U.S. 800 ..... *passim*
Helstoski v. *Meanor*, 442 U.S. 447 ..... 9, 16, 24
Hobson v. *Wilson*, 737 F.2d 1 39
Imbler v. *Pachtman*, 424 U.S. 409 ..... 4, 5, 8, 37, 41, 47, 48

Cases—Continued: Page

Katz v. *United States*, 389 U.S. 347 ..... 3, 5, 10, 27, 28, 29
Kenyatta v. *Moore*, 744 F.2d 1179 ..... 17, 22, 23, 25, 39
Kissinger v. *Halperin*, 452 U.S. 713 5
Krohn v. *United States*, 578 F. Supp. 1441, rev'd in part, 742 F.2d 24 ..... 16, 17, 22
Local No. 438 Construction Laborers v. *Curry*, 371 U.S. 542 19
McAlister v. *Kleindienst*, Civ. Action No. 72-1977 (E.D. Pa. filed Oct. 10, 1972) 4
McSurely v. *McClellan*, 521 F.2d 1024, aff'd, 553 F.2d 1277, cert. dismissed, 438 U.S. 189 16
McSurely v. *McClellan*, 697 F.2d 309 ..... 16, 17, 22, 24
Mercantile National Bank v. *Langdeau*, 371 U.S. 555 19
National Black Police Ass'n v. *Velde*, 712 F.2d 569, cert. denied, No. 83-1254 (Apr. 30, 1984) 17
Nixon v. *Fitzgerald*, 457 U.S. 731 ..... 9, 16, 24, 35, 37, 40, 42, 43
Pierson v. *Ray*, 386 U.S. 547 37
Sinclair v. *Kleindienst*, 645 F.2d 1080 ..... 7, 30
Spector Motor Service, Inc. v. *Walsh*, 139 F.2d 809, judgment vacated and remanded, *sub nom. Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101 32
Stack v. *Boyle*, 342 U.S. 1 13
Tenney v. *Brandhove*, 341 U.S. 367 ..... 38, 41
Totten v. *United States*, 92 U.S. 105 39
Tubbesing v. *Arnold*, 742 F.2d 401 26
United States v. *Berrigan*, 482 F.2d 171 2
United States v. *Brown*, 317 F. Supp. 531, appeal dismissed, 456 F.2d 1112, aff'd, 484 F.2d 418, cert. denied, 415 U.S. 960 30
United States v. *Butenko*, 318 F. Supp. 66, aff'd, 494 F.2d 593, cert. denied, 419 U.S. 881 30
United States v. *Clay*, Cr. No. 6711-94 (S.D. Tex. July 14, 1969), aff'd, 430 F.2d 165, rev'd, 403 U.S. 698 30

Cases—Continued: Page

United States v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) 3, 28, 29
United States v. *Hollywood Motor Car Co.*, 458 U.S. 263 23
United States v. *MacDonald*, 435 U.S. 850 ..... 19, 20, 21
United States v. *Nixon*, 418 U.S. 683 43
United States v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 3, 1970) 3, 28, 29
United States v. *Reynolds*, 345 U.S. 1 43
United States v. *Sinclair*, 321 F. Supp. 1074 33
United States v. *Smith*, 321 F. Supp. 424 29
United States v. *United States District Court*, 407 U.S. 297 ..... *passim*
United States v. *United States District Court*, 444 F.2d 651 29
Weinberg v. *Mitchell*, 588 F.2d 275 31
Weinberger v. *Catholic Action*, 454 U.S. 139 ..... 39, 43
Wood v. *Strickland*, 420 U.S. 308 4
Zweibon v. *Mitchell*:
516 F.2d 594, cert. denied, 425 U.S. 944 35
606 F.2d 1172, cert. denied, 453 U.S. 912 ..... 31, 35
720 F.2d 162, cert. denied, No. 83-2005 (Oct. 9, 1984) 30, 31

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8 (Speech or Debate Clause) 16
Art. II 43, 45
Art. II, § 2, Cl. 1 45
Amend. I 4
Amend. IV 4, 24, 27
Amend. V (Double Jeopardy Clause) 16
Amend. VI 21
Amend. IX 4
Classified Information Procedures Act, 18 U.S.C. App. at 549 *et seq.* 39
First Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92.. 45

Constitution, statutes and regulations—Continued: Page

Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq.*:
50 U.S.C. 1801-1803(a) 39
50 U.S.C. (1950 ed.) 1801-1811 32
50 U.S.C. 1803(b) 39
Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2510 *et seq.*:
18 U.S.C. 2510-2520 ..... 3, 34
18 U.S.C. (1976 ed.) 2511(3) 3
28 U.S.C. 511-513 45
28 U.S.C. 531 44
28 U.S.C. 1257 19
28 U.S.C. 1291 ..... 6, 8, 13
28 U.S.C. 1292(b) 24
Exec. Order No. 12,333, 3 C.F.R. 211 (1981) 44, 45
28 C.F.R. 0.85(d) 44

Miscellaneous:
H. Johnston, *The Correspondence and Public Papers of John Jay* (1891) 45
T. Madden & N. Allard, *Advice on Official Liability and Immunity, reprinted in* 2 Administrative Conference of the United States, *Recommendations and Report—1982* 47
P. Schuck, *Suing Government* (1983) 17

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-335

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 729 F.2d 267. The opinion of the court of appeals on respondent's motion to dismiss the appeal (Pet. App. 31a-42a) is reported at 700 F.2d 104. The opinion of the district court (Pet. App. 52a-77a) is reported at 551 F. Supp. 1247. The opinion of the district court denying certification of an interlocutory appeal (Pet. App. 44a-50a) is reported at 551 F. Supp. 1247. The prior opinion of the court of appeals (Pet. App. 83a-116a) is reported at 599 F.2d 1203. The initial opinion of the district court (Pet. App. 117a-142a) is reported at 447 F. Supp. 192.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1984. A petition for rehearing was denied on April 3, 1984 (Pet. App. 81a-82a). On June 25, 1984,

Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 31, 1984. The petition for a writ of certiorari was filed on that date and was granted on October 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set out in the petition at page 2.

STATEMENT

1. In June 1970, the Philadelphia office of the Federal Bureau of Investigation (FBI) was informed by a member of the East Coast Conspiracy to Save Lives (ECCSL) that the group was planning to protest the Vietnam War by destroying the underground utility tunnels serving a portion of the federal enclave in Washington, D.C. The plan was to be carried out in February 1971. The FBI also learned that the ECCSL already had been successful in carrying out several raids on draft board offices. In August 1970, the FBI received information that three ECCSL members, including William Davidon, a professor at Haverford College, had discussed a plan to kidnap Henry A. Kissinger, then Assistant to the President for National Security Affairs, simultaneously with the destruction of the utility system.[1] This latter information was conveyed to the White House in addition to the Attorney General (Pet. App. 85a, 120a-121a).[2]

On November 6, 1970, petitioner, serving then as Attorney General of the United States, approved a request by the Director of the FBI to place a telephone sur-

---

[1] The ECCSL's plans are discussed in *United States* v. *Berrigan*, 482 F.2d 171, 177-179 (3d Cir. 1973).

[2] During his deposition in this case, Attorney General Mitchell recalled that Secretary Kissinger was provided Secret Service protection in light of the kidnap threat (Mitchell Dep. 60). At that time, Secretary Kissinger was engaged in secret peace negotiations with the North Vietnamese in Paris (Mitchell Dep. 60-62).

veillance on Davidon's home telephone. The primary purpose of this surveillance was to gather intelligence about the ECCSL's plans, although it was anticipated that evidence for use in criminal proceedings might also be obtained. The wiretap was authorized for a period of 30 days and later reauthorized for an additional 30-day period. It was discontinued on January 6, 1971. During the surveillance, conversations between Davidon and respondent Keith Forsyth were overheard on three occasions (Pet. App. 85a-86a).

At the time of the Davidon surveillance, the only two federal courts that had considered the question had held that the President was permitted to order domestic security wiretaps without obtaining a warrant. *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) (J.A. 30); *United States* v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 3, 1970) (J.A. 38). In *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), this Court has expressly reserved decision on the question whether national security surveillances generally require warrants, and conflicting views on this question had been expressed by individual Justices in concurring opinions. Compare *id.* at 359-360 (Douglas, J., joined by Brennan, J., concurring) with *id.* at 362-363 (White, J., concurring). The federal wiretapping statute also provided no definitive answer to this question. Shortly after *Katz* was decided, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, to govern the use of wiretaps. However, a provision of that Act, 18 U.S.C. (1976 ed.) 2511(3), "ma[de] clear that the Act simply did not legislate with respect to national security surveillances." *United States* v. *United States District Court*, 407 U.S. 297, 306 (footnote omitted) (1972) [hereinafter cited as *Keith*].

2. After respondent Forsyth learned of the wiretaps, he instituted this action in the United States District Court for the Eastern District of Pennsylvania against petitioner and two FBI employees who had installed and

maintained the electronic surveillance.[3] Respondent sought damages for the three overhearings of his telephone conversations, claiming that the warrantless electronic surveillance violated Title III and the First, Fourth, and Ninth Amendments to the Constitution.[4]

After discovery, petitioner filed a motion for summary judgment urging, inter alia, that the case be dismissed on absolute and qualified immunity grounds. The district court denied this motion (Pet. App. 117a-142a). The court held (*id.* at 134a-137a) that petitioner was not entitled to absolute immunity under *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), because he was functioning as an administrator rather than as a prosecutor. The court also held (Pet. App. 140a-142a) that the claim of qualified immunity could not be resolved on a motion for summary judgment. Applying the qualified immunity standard articulated in *Wood* v. *Strickland*, 420 U.S. 308 (1975), and *Butz* v. *Economou*, 438 U.S. 478 (1978), the court concluded that there were genuine (but unspecified) issues of material fact "in connection with the defendants' affirmative defense of good faith" (Pet. App. 142a).

3. On appeal from the denial of the motion for summary judgment, the court of appeals held that it had

---

[3] Respondent also named as defendants former Attorney General Richard G. Kleindienst and former Acting FBI Director L. Patrick Gray III. These defendants' respective terms of office did not coincide with the period of the surveillance, and accordingly the claims against them were voluntarily dismissed in the district court.

[4] One other damage action based on the Davidon surveillance is still pending against petitioner. That suit, *McAlister* v. *Kleindienst*, Civ. Action No. 72-1977 (filed Oct. 10, 1972 E.D. Pa.), which was filed by Davidon and another person overheard on the surveillance, has been stayed pending disposition of appellate proceedings here. In another suit, which was based both upon the Davidon surveillance and another wiretap, the district court recently granted summary judgment for petitioner, holding that the illegality of the wiretaps was not clearly established at the time in question. *Burkhart* v. *Saxbe*, 596 F. Supp. 96 (E.D. Pa. 1984) (see Pet. App. 143a-155a).

jurisdiction to review the district court's denial of absolute immunity (Pet. App. 89a-95a). On the merits of this issue, the court concluded (*id.* at 95a-111a) that, under *Butz* v. *Economou*, 438 U.S. at 515, and *Imbler* v. *Pachtman*, *supra*, the Attorney General is absolutely immune from personal damages liability for his official acts only when performing functions analogous to those of a prosecutor. The court of appeals rejected any notion that broader absolute immunity was needed to protect the Attorney General from harassing lawsuits, stating that "*Butz* * * * was unconcerned with this problem" (Pet. App. 101a). The court of appeals remanded the case to the district court to consider whether, in authorizing the electronic surveillance challenged by respondent, petitioner was exercising a prosecutorial function or was engaged in "purely investigative or administrative function[s]" (Pet. App. 111a). A petition for a writ of certiorari was denied (453 U.S. 913 (1981)) after this Court was unable to render an opinion on related immunity issues in *Kissinger* v. *Halperin*, 452 U.S. 713 (1981).

On remand, the district court again rejected petitioner's claim to absolute immunity (Pet. App. 54a-60a). The court also rejected petitioner's claim to qualified immunity under the new qualified immunity standard articulated in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (Pet. App. 60a-77a). The district court concluded that petitioner had violated a warrant requirement that was "clearly established" long before this Court addressed the national security warrant question "for the first time" in *Keith* (407 U.S. at 299). To support this conclusion, the district court cited (Pet. App. 64a-66a) this Court's holding in *Katz* v. *United States*, *supra*, that nontrespassory surveillances generally require warrants, as well as the concurring opinion of Justice Douglas, joined by Justice Brennan, which the district court stated "should have provided particular guidance to de-

fendant Mitchell and all other attorneys regarding the constitutionality of warrantless domestic security wiretaps" (Pet. App. 65a). The court also concluded that "the Justice Department had reason to know that its position regarding the need for a warrant was subject to both question and attack" because the constitutionality of the surveillance involved in *Keith* had been challenged in a motion filed in the underlying criminal proceedings "more than one month prior to the Attorney General's authorization of the [Davidon] wiretap" (Pet. App. 64a). Finally, the court stated (*id.* at 67a) that "the Attorney General's action was in direct conflict with the language, legislative history, and purpose of Title III."

The district court held that petitioner was liable for the alleged violations and set the case for an evidentiary hearing "to determine whether the plaintiff is entitled to punitive damages and/or compensatory damages" (Pet. App. 76a).[5] In a later ruling, the court declined to certify its order for interlocutory appeal (*id.* at 44a-50a).

4. Petitioner appealed under 28 U.S.C. 1291 and also filed a petition for mandamus, contending that his claims of absolute and qualified immunity had been wrongly denied. Respondent moved to dismiss the appeal for lack of a final, appealable order. A motions panel of the court of appeals denied this motion in part (Pet. App. 31a-43a). The panel held (*id.* at 34a, 43a) that denial of a claim of absolute immunity is immediately appealable and referred the question whether a denial of qualified immunity is appealable as a collateral order to the merits panel. The motions panel stayed further proceedings below, noting that a trial on punitive damages would involve an inquiry into petitioner's motivation and the advice he received from subordinates in the Depart-

---

[5] The district court also held that trial was required on the question of the liability of the two FBI employees who actually intercepted respondent's conversations pursuant to the Attorney General's authorization. Respondent subsequently dismissed his claim against the FBI employees.

ment of Justice that might be "as searching as the trial on the merits would have been" (*id.* at 34a). The motions panel further noted (*id.* at 33a n.2) that the district court's ruling on the state of national security electronic surveillance law in 1970 and 1971 differed from that of the District of Columbia Circuit in *Sinclair* v. *Kleindienst*, 645 F.2d 1080 (1981).

In the decision which is now being reviewed, the merits panel first held (Pet. App. 8a-12a) that petitioner was not entitled to absolute immunity. This Court's intervening decision in *Harlow* v. *Fitzgerald* had recognized (457 U.S. at 812) that absolute immunity might be justified "to protect the unhesitating performance" of vital functions by government officials responsible for decisions in "such sensitive areas as national security or foreign policy." However, the court of appeals declined to address this portion of the *Harlow* opinion. Instead the court observed (Pet. App. 9a-12a) that *Harlow* had not changed the analysis of absolute immunity in *Butz* and that petitioner's claim of absolute immunity under the *Butz* analysis had been " '*sub silentio* rejected' " in the court of appeals' prior opinion.

The court of appeals then held (Pet. App. 12a-15a) that denial of petitioner's claim of qualified immunity was not appealable under the collateral order doctrine. The court expressed the fear (*id.* at 15a) that accepting jurisdiction over this issue would "subject our colleagues to unnecessary additional burdens by opening the sluice gates." The court denied petitioner's mandamus petition "for the same reasons" (*ibid.*).

Judge Weis dissented (Pet. App. 15a-29a). Agreeing with decisions of the District of Columbia and Eighth Circuits, he first concluded (*id.* at 16a-20a) that the collateral order doctrine permits an immediate appeal when a claim of qualified immunity is denied on the ground that the legal standard allegedly violated was clearly established at the time in question.

Turning to the merits of the qualified immunity issue, Judge Weis reviewed at length (Pet. App. 20a-28a) the

state of the law in 1970 and early 1971 regarding warrantless national security wiretaps and concluded that "[u]nquestionably, a prohibition against warrantless searches in these circumstances was not 'clearly established'," since "the law of warrantless electronic surveillance in national security cases was only beginning to develop in 1970-71" (*id.* at 27a-28a).

On the issue of absolute immunity, Judge Weis noted (Pet. App 20a) that the claim then before the court, based on the Attorney General's special functions in the area of national security, was different from the claim, based on *Imbler* v. *Pachtman*, *supra*, that had been reviewed in the prior appeal. He wrote that "*Harlow's* discussion of the 'special functions' test, as it might apply to the Attorney General in cases implicating national security, lends a force to the defendant's argument here that was lacking in *Forsyth I*" (Pet. App. 20a). Judge Weis did not address the absolute immunity issue further, however, in light of his conclusion that petitioner was entitled to qualified immunity (*ibid.*).

A petition for rehearing and suggestion for rehearing en banc was denied, with four of the ten active judges voting to rehear the case en banc (Pet. App. 81a-82a).

SUMMARY OF ARGUMENT

I.

A. The district court's decision denying petitioner's claim of qualified immunity on the ground that he violated a clearly established legal standard was appealable under 28 U.S.C. 1291, which permits appeals from "final decisions" of the district courts. In determining whether Section 1291's finality requirement has been met, this Court adopts a "practical rather than a technical construction" (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)) and evaluates the danger of denying justice by delay compared to the inconvenience and costs of piecemeal review.

These factors weigh strongly in favor of appeal here. As the Court explained in *Butz* v. *Economou*, 438 U.S. 478 (1975) and in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), qualified immunity is intended to protect government officials, not only from adverse money judgments, but from the burdens and distractions of discovery and trial. If an official must await final judgment before appealing an erroneous denial of immunity, this protection will have been irreparably lost. For precisely this reason, this Court has held that an immediate appeal is available when various types of absolute immunity from the burdens of trial are denied. See *Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy immunity from second trial); *Helstoski* v. *Meanor*, 442 U.S. 447 (1979) (Congressman's immunity from trial for legislative acts); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1981) (President's absolute immunity from trial for damages). The same appellate rights are needed here.

Allowing an appeal in this situation would not impair the efficient administration of justice. Under *Harlow's* objective test, the question whether an official violated a "clearly established" constitutional or statutory right will present issues of law not enmeshed with any disputed facts. Thus, deferring appellate review until after trial would not aid the courts of appeals in deciding these questions. In addition, experience in the District of Columbia Circuit, where such appeals have been allowed for two years, suggests that the burden of additional appeals will be minimal. Indeed, overall judicial efficiency will be improved by the prompt appellate termination of meritless suits against government officials, which often drag on for many years.

An appeal from the denial of a government official's claim of immunity falls within the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. at 546. This doctrine permits an immediate appeal if an order (1) definitively determines the disputed question, (2) is separable from and collateral to the re-

mainder of the case, and (3) would be effectively unreviewable on appeal. Here, there can be no doubt that the district court definitively rejected petitioner's assertion that he violated no "clearly established" legal right. Petitioner's claim is also separable from and collateral to the remainder of the case because it presents a pure question of law that would not be illuminated by the remaining trial proceedings and because its purpose is not simply to secure an early decision on the merits, but to safeguard petitioner's immunity against further burdensome and intrusive trial proceedings. Finally, petitioner's qualified immunity claim would not be effectively reviewable after final judgment because by that time the very purpose of immunity—to protect petitioner from the burdens of discovery and trial—would have been irrevocably sacrificed.

B. If this Court agrees that the denial of petitioner's qualified immunity claim was appealable, we urge the Court itself to decide now whether petitioner was entitled to qualified immunity, rather than remanding for a decision on that issue by the court of appeals. Under *Harlow*, a government official is immune from liability for damages unless he violated a "clearly established" legal standard, and there can be no serious dispute that the need for a warrant for national security wiretaps was not clearly established in late 1970 and early 1971, when the wiretap at issue ~~were~~ was installed. In *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), this Court had expressly reserved decision on this question, and individual members of the Court had expressed differing views with respect to it. It was not until June 1972—15 months after the termination of the wiretap involved in this case—that this Court again addressed the question and held in *United States* v. *United States District Court* (*Keith*), 407 U.S. 297 (1972), that a warrant is needed.

The lower court cases in the post-*Katz*, pre-*Keith* era also did not establish the need for a warrant to investigate a domestic threat to national security. At the time

of the wiretap involved here, the only decisions on the question were two district court cases holding that a warrant was not needed. And when this Court addressed the question in *Keith*, it noted (407 U.S. at 299) that it was deciding the question for "the first time" and that such warrantless wiretaps had been conducted by Presidents for more than 25 years "without * * * a definitive decision of this Court."

With the exception of the district court in the present case, every other court that has examined the state of wiretapping law in 1970 and 1971, including the District of Columbia Circuit, has concluded that the need for a warrant in domestic national security cases was not clearly established until this Court's decision in *Keith*. And the Ninth Circuit has held that *Keith* was not even clearly foreshadowed. The district court's contrary conclusion here cannot be defended.

II.

The Attorney General should be absolutely immune from liability for damages when he acts to protect the national security. In *Harlow*, 456 U.S. at 812, this Court noted that in sensitive areas such as national security and foreign policy, "unhesitating performance of functions vital to the national interest" may justify absolute immunity. We believe that the Attorney General should not be subject to personal monetary liability when he is acting to prevent acts that endanger national security, and that absolute immunity is therefore justified.

Protecting the domestic security of the Nation from terrorism, violence, and espionage is one of the President's paramount duties, and the Attorney General is the Cabinet officer who bears the principal operational responsibility for these vital matters. When national security is imperiled, the Attorney General must act promptly, decisively, and effectively. He should be concerned solely for the national good and should not have to worry about personal liability in damages or about the burdens and

risks of prolonged litigation. Decisions concerning national security are too important, and the price of bad decisions or inaction is too high, to permit such considerations to distort the decisionmaking process. In this very case, petitioner was forced to confront a kidnapping plot that threatened danger to the person of one of the President's principal foreign policy advisors and that could have compromised some of the country's most vital secrets. The need for effective action to block such a threat far outweighs whatever incremental deterrent effect the possibility of liability in damages might provide.

Absolute immunity in this restricted area would not render the Attorney General unaccountable for his actions. Other potent remedies would remain, including suits for injunctive and declaratory relief, motions to suppress evidence seized in bad faith, congressional oversight, dismissal from office, impeachment, and criminal prosecution.

Qualified immunity does not furnish sufficient protection in this area, just as it does not furnish sufficient protection for judges, prosecutors, and the President. Notwithstanding *Harlow*, qualified immunity leaves a decisionmaker, acting without the benefit of hindsight, in an atmosphere of substantial uncertainty and subject to serious risk that unhesitating and energetic action will lead to protracted litigation.

ARGUMENT

I. PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY UNDER *HARLOW* FOR AUTHORIZING WARRANTLESS DOMESTIC SECURITY WIRETAPS IN 1970 AND 1971

A. Denial of a Qualified Immunity Claim in a *Bivens* Suit Is Appealable Under the Collateral Order Doctrine

1. "The first Judiciary Act of 1789, 1 Stat. 73, established the general principle that only *final* decisions of the federal district courts would be reviewable on ap-

peal." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 83 (1981) (emphasis in original). "With occasional modifications, [this] requirement has remained a cornerstone of the structure of appeals in the federal courts." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306 (1962) (footnote omitted). Today, this principle is embodied in 28 U.S.C. 1291, under which the courts of appeals have jurisdiction of all "final decisions" of the district courts except where there is a right of direct appeal to this Court.

As Justice Jackson noted in *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (emphasis in original), however, "it is a final *decision* that Congress has made reviewable," not a final judgment. "While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Ibid.* "[A] decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964). In determining whether the requirement of finality is met, this Court adopts a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). In essence, this means that the Court decides whether allowing an appeal from a particular type of order comports with the purposes of the final judgment rule. The Court has observed that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Gillespie* v. *United States Steel Corp.*, 379 U.S. at 152-153, quoting *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). See also *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974).[6]

---

[6] In *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 4, this Court recently elaborated on the considerations underlying the finality requirement:

> The final judgment rule serves several important interests. It helps preserve the respect due trial judges by minimizing

2. These considerations weigh strongly in favor of allowing appeal when a government official's qualified immunity is denied before trial, because "the danger of denying justice by delay" is great. This Court has not addressed the specific issue presented in this case—whether government officials who are sued for damages may appeal the denial of qualified immunity claims. But the nature of the qualified immunity right, as explained by this Court, demands such appeal rights if the official's immunity is to be fully protected. In *Butz* v. *Economou*, *supra*, the Court held that Cabinet and other executive officers are not protected by blanket absolute immunity but instead are generally entitled to only qualified immunity. However, a corollary of this holding was that "[i]nsubstantial lawsuits" should be "quickly terminated" (438 U.S. at 507). The Court expressed the expectation that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits" (*id.* at 508). See also *Hanrahan* v. *Hampton*, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part).

When this expectation was not borne out, the Court modified the qualified immunity standard in *Harlow*. Time and again, the *Harlow* court emphasized that an executive official's qualified immunity includes the right not to undergo protracted and burdensome trial proceedings on insubstantial claims:

> [In *Butz*,] we emphasized our expectation that insubstantial suits need not proceed to trial[.]

457 U.S. at 808.

> [P]etitioners assert that public policy * * * mandates an application of the qualified immunity

---

appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.

> standard that would permit *the defeat of insubstantial claims without resort to trial.*

Id. at 813 (emphasis added).

> [In *Butz* and *Scheuer*], we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated." * * * Yet petitioners advance persuasive arguments that the *dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the "good faith" standard established by our decisions.*

Id. at 814-815 (emphasis added).

> The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that *insubstantial claims should not proceed to trial.*

Id. at 815-816 (emphasis added).

> [I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there *the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of the able people from public service.* There are special costs to "subjective" inquiries of this kind.

Id. at 816 (emphasis added).

> [B]are allegations of malice should not suffice to subject government officials either to *the costs of trial or to the burdens of broad-reaching discovery.*

Id. at 817-818 (emphasis added) (footnote omitted).

> Reliance on the objective reasonableness of an official's conduct, * * * should avoid *excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.*

Id. at 818 (emphasis added). See also *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 11-12.

Harlow could hardly have made it clearer that an executive officer's qualified immunity includes a right not to be tried or burdened by pretrial procedures unless his alleged conduct violated a clearly established legal standard. See *Krohn* v. *United States*, 742 F.2d 24, 28 (1st Cir. 1984); *McSurely* v. *McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982). This right is closely analogous to the double jeopardy "guarantee against being twice put to trial for the same offense" (*Abney*, 431 U.S. at 660-661) (emphasis in original deleted), as well as a Congressman's immunity under the Speech or Debate Clause "not only from the consequences of litigation's results but also from the burden of defending [himself]." *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967); see also *Helstoski* v. *Meanor*, 442 U.S. at 508. The Court has recognized in *Abney* and *Helstoski* v. *Meanor* that full protection of Double Jeopardy and Speech or Debate Clause rights requires that pretrial appeals be available.

This Court has also held that an order denying a claim of absolute immunity from damages liability is immediately appealable. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982). As the District of Columbia Circuit stated in a decision on which the *Nixon* court relied (*ibid.*):

> If [the defendants] are required to respond to interrogatories, answer questions put in depositions, and defend themselves in a plenary trial covering the whole of their activities, they will have been forced to surrender their claimed privilege regardless of its validity. An appeal from the final judgment in the action will come too late to give meaningful review of their claim.

McSurely v. *McClellan*, 521 F.2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F.2d 1277, 1283-1284 & n.18 (D.C. Cir. 1976), cert. dismissed, 438 U.S. 189 (1978). The same appellate rights are needed to protect the qualified immunity extended under *Butz* and *Harlow*.

"'[T]he costs of piecemeal review'"[7] in the present situation do not dictate a different result. Under *Harlow's* objective test, qualified immunity appeals will present pure questions of law not enmeshed with any disputed facts. Consequently, deferring appellate review until after final judgment would not assist the courts of appeals in deciding these questions. To be sure, allowing appeal before final judgment may mean that there will be more appeals, a matter of legitimate concern for overburdened appellate judges. Experience, however, suggests that the number of additional appeals will not approach the level suggested by the court of appeals in this case (Pet. App. 14a-15a). The denial of qualified immunity has been appealable in the District of Columbia Circuit for almost exactly two years, since *McSurely* v. *McClellan*, 697 F.2d 309 (D.C. Cir. 1982), but we do not believe that any federal defendant has taken such an appeal in the D.C. Circuit during that period. Experience has also shown both that the overwhelming percentage of suits for damages against government officials lack merit[8] and that such suits frequently linger in the trial courts for inordinate periods.[9] Allowing officials to appeal denials of qualified immunity will assist in bring-

---

[7] *Gillespie* v. *United States Steel Corp.*, 379 U.S. at 152-153, quoting *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. at 511.

[8] See P. Schuck, *Suing Government* 70 (1983) ("[A]pproximately 10,000 *Bivens* actions have reportedly produced only thirteen judgments for plaintiffs.")

[9] The reported decisions involving qualified immunity appeals illustrate this problem. In this case, 12 years have passed since the filing of the complaint (J.A. 1). See also *National Black Police Ass'n* v. *Velde*, 712 F.2d 569, 572 (D.C. Cir. 1983), cert. denied, No. 83-1254 (Apr. 30, 1984) (9 years from filing of complaint to denial of certiorari); *McSurely*, 697 F.2d at 314 (13 years from complaint to decision on qualified immunity); *Krohn* v. *United States*, 578 F. Supp. 1441, 1444 (D. Mass.), rev'd in part, 742 F.2d 24 (1st Cir. 1984) (8 years); *Kenyatta* v. *Moore*, 744 F.2d 1179, 1181 (5th Cir. 1984) (7 years).

ing meritless suits to a speedier end and thus will promote, rather than detract from, "the efficient administration of justice" (*Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 4). See Pet. App. 28a (Weis, J., dissenting). Moreover, it is not uncommon for defendant officials to assert claims of both absolute and qualified immunity, as petitioner did in this case. Since it is already established that the denial of absolute immunity is appealable, permitting an appeal on the issue of qualified immunity as well would not result in any additional appellate proceedings in these cases.

3. The seminal case of *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, involved a situation in which, as in this case, the purposes of the final judgment rule were served by allowing an appeal from an order other than the final judgment. In *Cohen*, which was a stockholder's derivative action brought in federal court under diversity jurisdiction, a state statute entitled the corporation to demand security in advance for litigation expenses. The district court ruled that the statute was inapplicable, and this Court held that the order was immediately appealable. The Court observed (337 U.S. at 546):

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

More recent cases have restated *Cohen's* formulation as a three-part test:

> First, [a trial court order] "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on appeal from a final judgment."

Flanagan v. *United States*, slip op. 6, quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); see also *United States* v. *MacDonald*, 435 U.S. 850, 855 (1978); *Abney* v. *United States*, 431 U.S. 651, 658 (1977).

Despite the utility of *Cohen* as a most important rule of thumb, this Court has always understood that "[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 170. Many decisions of this Court permitting appeal under *Cohen* in civil cases cannot easily be fitted into this three-part test. For example, in *Gillespie* v. *United States Steel Corp.*, *supra*, appeal was permitted from an order striking certain wrongful death claims on the ground that they were precluded by an exclusive statutory remedy. This order may have "conclusively determine[d]" this legal question, but the validity of a plaintiff's claims would not appear to be "completely separate from the merits of the action" (*Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468). Likewise, the Court did not find that the order striking the claims would "be effectively unreviewable on appeal from a final judgment" (*ibid.*) but only that "it [did] not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered." (*Gillespie* v. *United States Steel Corp.*, 379 U.S. at 153).

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963), similarly, does not fit neatly into the three-part test. There, the Court held that an order rejecting a claim of improper venue was final under 28 U.S.C. 1257, even though there was no suggestion that the question of venue could not have been reviewed effectively on appeal from the final judgment. See also *Local No. 438 Construction Laborers* v. *Curry*, 371 U.S. 542 (1963).

4. As these cases illustrate, *Cohen* and its progeny have not been understood to lay down a rigid test for

finality; instead, the *Cohen* test, like the final order rule itself, must be given a "practical rather than a technical construction" (*Cohen*, 337 U.S. at 546). Ultimately, the inquiry must be whether allowing an appeal is consistent with the purposes of the final judgment rule, and each prong of the *Cohen* test should be interpreted in light of those purposes.

The first prong—the requirement that the trial court order "must conclusively determine the disputed question" (*Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468)—ensures that the matter is ripe for appeal. It promotes "the efficient administration of justice" (*Flanagan*, slip op. 4) by precluding appellate review until all of the relevant facts and legal issues have been fully developed and the trial court has had an opportunity to complete its consideration of the matter. Under this prong of the test, the Court has repeatedly "rejected immediate appealability * * * of claims that 'may fairly be assessed' only after trial * * * and those involving considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377 (1981). See also *Coopers & Lybrand* v. *Livesay*, 437 U.S. at 469; *United States* v. *MacDonald*, 435 U.S. at 860.

The third prong, which requires that the trial court order must "be effectively unreviewable on appeal from a final judgment" (*Coopers & Lybrand*, 437 U.S. at 468), ensures that there is a practical reason for allowing an appeal before entry of the final judgment. It requires that "the danger of denying justice by delay" outweigh "the inconvenience and costs of piecemeal review." *Gillespie* v. *United States Steel Corp.*, 379 U.S. at 152-153.

The purposes served by the second prong—the requirement that the order must resolve an issue "completely separate from the merits of the action" (*Coopers & Lybrand*, 437 U.S. at 468)—are somewhat less obvious. The "separate" or "collateral" nature of the order is not demanded for abstract or technical reasons. Instead this

prong appears to promote the same purposes as the first and third prongs. Like the first prong, it prevents appeal before full development and resolution at the trial level of all factual and legal issues. If an order relates to a collateral matter, rather than being closely connected to the merits of the case, there is much less chance that subsequent developments at trial will cast new light on the matter or prompt its reconsideration.[10]

The second prong, like the third, also ensures that there is a special reason for allowing an appeal before final judgment. The final order rule is predicated on the principle that the right to appeal should not ordinarily be extended simply to prevent a trial on unmeritorious criminal charges or civil claims. In the criminal context, the Court has observed that "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); see also *Flanagan*, slip op. 8. No doubt the same prin-

---

[10] The relationship between the first and second prongs of the three-part test has frequently been noticed by this Court. In *MacDonald*, 435 U.S. at 859, the Court remarked:

> Closely related to the "threshold requirement of a fully consummated decision," *Abney* v. *United States*, 431 U.S. at 659, is the requirement that the order sought to be appealed be "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged."

In *Flanagan*, which held that an order disqualifying counsel in a criminal case is not immediately appealable, the Court at one point assumed (slip op. 9) that the defendants' Sixth Amendment claims required "some specifically demonstrated prejudice to the defense" and explained that "[o]n this assumption, a disqualification order * * * is not independent of the issues to be tried" because "[its] validity cannot be adequately reviewed until the trial is complete." See also *Abney*, 431 U.S. at 660 (emphasis added) (citation omitted) ("[T]he matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself *in the sense that they will not affect, or . . . be affected by, decision of the merits of this case.*")

ciple applies in the civil context. Thus, if an appellant merely seeks an advance ruling on the merits or on a matter that will merge into the judgment on the merits (see *Cohen*, 337 U.S. at 546), appeal generally will not be entertained. In order to qualify under *Cohen*, the appeal must be "separate" from or "collateral" to the merits in this sense.[11]

5. The district court's order in this case, which denied petitioner's claim to qualified immunity, satisfies the formulation taken from *Cohen*. Such orders are therefore appealable. *Krohn* v. *United States*, 742 F.2d 24 (1st Cir. 1984); *Evans* v. *Dillahunty*, 711 F.2d 828 (8th Cir. 1983); *McSurely* v. *McClellan*, 697 F.2d 309 (D.C. Cir. 1982). Contra, *Kenyatta* v. *Moore*, 744 F.2d 1179 (5th Cir. 1984).[12]

a. There can be no doubt that the district court's decision "constitute[s] a complete, formal, and, in the trial court, final rejection" of petitioner's claim. *Abney* v. *United States*, 431 U.S. at 659. Nearly seven years have passed since Judge Broderick initially rejected petitioner's claim of qualified immunity (Pet. App. 117a), and during that time, the standard for qualified immunity was significantly altered by this Court in *Harlow*. Yet Judge Broderick steadfastly adhered to his original conclusion

---

[11] This function of the second prong of the *Cohen* test has also been noted by this Court. For example, in *Abney* the Court explained that a double jeopardy claim is "collateral to, and separable from" the principal issue of the accused's guilt or innocence because (431 U.S. at 659 (emphasis added)):

> [i]n arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. * * * *Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.*

[12] For the Fourth Circuit's treatment of this issue, see page 26 note 17, *infra*.

that petitioner is not protected by any form of immunity. "There are simply no further steps that can be taken in the District Court to avoid the trial [petitioner] maintains is barred." *Abney*, 431 U.S. at 659.

b. Likewise, the appeal in this case satisfied the third prong of the *Cohen* test—which is "[p]erhaps [the] most important" (*United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 266 (1982))—for it is abundantly clear that the district court's decision involves "an important right which would be 'lost, probably irreparably,' if review had to await final judgment." *Abney*, 431 U.S. at 658, quoting *Cohen*, 337 U.S. at 546. As we have noted, one of the purposes of qualified immunity is to relieve officials of the burdens of pretrial and trial unless the alleged conduct violated a clearly established legal standard (see pages 14-16, *supra*). Unless the denial of qualified immunity can be appealed before discovery or trial, this purpose will be irreparably compromised.

In agreeing with the Third Circuit that denial of a qualified immunity claim cannot be appealed until final judgment, the Fifth Circuit expressed the sanguine belief (*Kenyatta* v. *Moore*, 744 F.2d at 1184) that "few if any district judges are likely to mistake insubstantial claims for violations of clearly established rights." The present case vividly illustrates that this confidence can be misplaced, particularly in the case of an unpopular defendant. Prior to handing down its final decision on qualified immunity, the district court had the benefit of decisions by two courts of appeals finding that the illegality of petitioner's conduct was not clearly established or even foreshadowed at the time in question (see page 30-31, *infra*). Nevertheless, the district court rejected petitioner's qualified immunity claim. Moreover, despite the weighty contrary authority and despite this Court's admonition in *Harlow* that insubstantial *Bivens* claims should not be allowed to proceed to discovery or trial, the district court refused to certify the qualified immunity

issue for appeal under 28 U.S.C. 1292(b).[13] The court of appeals, in turn, refused to entertain petitioner's appeal under the collateral order doctrine, refused to address the well established rules governing such appeals, and denied petitioner's mandamus petition without explanation, thereby subjecting petitioner to an unnecessary and potentially protracted trial on the issue of damages. The prospect of such treatment will " 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties' " (*Harlow*, 457 U.S. at 814 (citation omitted)).

c. Further, petitioner's appeal is "separate" and "collateral' in the sense that it sought something other than an advance ruling on the merits or on a matter that will emerge from and merge into the judgment on the merits. Instead, petitioner's appeal sought to vindicate a special immunity from trial analogous to the immunities asserted in *Nixon*, *Abney*, and *Helstoski* v. *Meanor*.[14] The district court's decision here was also "collateral" and "separate" in the sense that its correctness would not be affected by anything that might occur during the remaining trial proceedings.[15] Consequently, petitioner's appeal satisfies the second prong of the *Cohen* formulation.[16]

---

[13] Compare *McSurely* v. *McClellan*, 697 F.2d at 316-317 n.12 (certification under Section 1292(b) "particularly appropriate" in this situation).

[14] See Pet. App. 34a.

[15] See also *Chagnon* v. *Bell*, 642 F.2d 1248, 1261 (D.C. Cir. 1980), cert. denied, 453 U.S. 911 (1981) (contrasting qualified immunity inquiry with merits of Fourth Amendment claim); Pet. App. 34a.

[16] We are not arguing that the denial of summary judgment is immediately appealable when resolution of a qualified immunity claim turns on disputed facts, but only that an appeal should be allowed when the qualified immunity claim turns solely on a question of law. This may occur in two contexts. The first and probably the most common is exemplified by this case, in which petitioner's actions are not disputed. In such a situation, if qualified immunity is denied, liability will have been established and the

6. The court of appeals' reasons for holding that it lacked appellate jurisdiction are unsound. The court declined to address this Court's precedents under the collateral order doctrine. Instead, the court of appeals rested (Pet. App. 12a-14a) on its prior, summary treatment of the issue of appealability (see Pet. App. 94a-95a). But that prior holding antedated *Harlow's* deletion of the subjective element of the qualified immunity defense, and consequently at that time petitioner and the other defendants did not "seriously contend that the denials of their motions for summary judgment on that issue [were] appealable under the three requirements of *Cohen*" (Pet. App. 95a).

The court of appeals protested (*id.* at 14a-15a) that its docket was already "crushing" and that there was accordingly no room for qualified immunity appeals. As noted, however, the court's fears about the number of qualified immunity appeals appear exaggerated (see page 17, *supra*).

Finally, the court of appeals advanced the strange argument (Pet. App. 14a) that an appeal could not be taken here because respondent's claims were not "insubstantial." The Fifth Circuit adopted the same argument in *Kenyatta* v. *Moore*, 744 F.2d at 1184, and added (*id.* at 1186) that orders denying qualified immunity should not be "appealable per se" because many such claims "involve only the application of settled principles, not important, unresolved legal issues." The analysis of both circuits is misguided. It is true that the collateral order doctrine is limited to decisions concerning "an impor-

---

only remaining issue will be the wholly separable question of damages.

The other situation in which an appeal should be allowed is where the facts are contested but the defendant contends that even the conduct alleged by the plaintiff did not violate any clearly established rule of law. Here too, the pure question of law presented by the summary judgment motion will not be affected by any fact brought out at trial. The most that a trial might establish is that the plaintiff's allegations were correct.

tant issue" (*Coopers & Lybrand* v. *Livesay*, 437 U.S. at 468), but this involves a categorical, not a case-by-case determination. "Appeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States*, 354 U.S. 394, 405 (1957). *Harlow* has made it unmistakably clear that an executive official's right not to undergo discovery and trial if no clearly established constitutional rights were violated is a matter of important public policy. In the face of that determination by this Court, it is not for the courts of appeals to prejudice the vindication of this right by ad hoc prejudgments of the merits or by disparaging its significance. When a district court incorrectly denies qualified immunity because it misapplies clear or settled law—as Judge Broderick unquestionably did here—the violation of *Harlow* is all the more flagrant, and prompt appellate correction is especially "important." [17]

---

[17] Taking a narrower view than the court of appeals below and the Fifth Circuit, the Fourth Circuit has held that rejection of a qualified immunity claim is not appealable where there are overlapping claims for injunctive relief that would require trial in any event. *England* v. *Rockefeller*, No. 83-1851(L) (July 16, 1984), and *Bever* v. *Gilbertson*, 724 F.2d 1083 (4th Cir. 1984) (rehearing denied by equally divided court), cert. denied, Nos. 84-25 and 83-2139 (Oct. 29, 1984). The court reasoned (724 F.2d at 1087) that "[a] present declaration of immunity from damage claims cannot avoid the diversion of their attention from other official duties which the litigation will occasion." There is some force to this reasoning but we do not believe it is sufficient to overcome the strong grounds for protecting public officials from trial on insubstantial damages claims. See *Tubbesing* v. *Arnold*, 742 F.2d 401, 403-405 (8th Cir. 1984) (rejecting *Bever* distinction). The burden of defending an action for injunctive relief in one's official capacity is not comparable to the burden of defending against a suit for damages. Moreover, disallowing appeal in only those cases with overlapping injunctive claims might well encourage the filing of injunctive claims, together with claims for damages, for the sole purpose of cutting off appeal rights. Such a rule would also have the incongruous effect of providing less protection for current

B. Petitioner Did Not Violate a Clearly Established Legal Standard

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow* v. *Fitzgerald*, 457 U.S. at 818). If anything can be clear, it is that no "clearly established" rights of any sort were violated when petitioner authorized the warrantless domestic security wiretaps at issue in this case.

1. In June 1972, this Court held in *Keith* that the Fourth Amendment requires a warrant for domestic security wiretaps. *But the wiretaps in this case ended 15 months earlier, in January 1971.* At that time the constitutional rule adopted in *Keith* cannot be characterized as having been "clearly established."

Certainly this Court had not decided the question prior to *Keith*. In *Katz* v. *United States*, 389 U.S. 347 (1967), the Court had held for the first time that electronic surveillance, whether or not accompanied by a physical trespass, constitutes a search and seizure within the meaning of the Fourth Amendment if it violates a legitimate expectation of privacy. The Court held (389 U.S. at 354-359) that a warrant was required for the electronic surveillance in that case. But the Court did not rule out the possibility of exceptions in other circumstances, and pointedly observed (389 U.S. at 358 n.23):

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

---

officials than for former officials. Yet the deleterious effect of damages actions on current officials, whose performance of public responsibilities may be affected, is probably greater than the effect on former officials who are no longer in government service.

In a concurring opinion, Justice White noted this portion of the Court's opinion and wrote (*id.* at 363-364):

> Wiretapping to protect the security of the Nation has been authorized by successive Presidents. * * * * * We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

See also *Berger* v. *New York*, 388 U.S. 41, 112-118 (1967) (White, J., dissenting).

In another concurring opinion, Justice Douglas, joined by Justice Brenann, disagreed, terming Justice White's opinion "a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters" (389 U.S. at 359).

Thus, *Katz* explicitly left open the question of the legality of warrantless national security wiretaps, with one Justice suggesting that such wiretaps might be constitutional and two others disagreeing. This Court did not provide further guidance on the question until *Keith*.

2. The lower court decisions in the post-*Katz*, pre-*Keith* era also did not establish the illegality of warrantless domestic security wiretaps. At the time of the surveillance in this case, the only two federal courts that had considered the question had held that the President was permitted to order such wiretaps without obtaining a warrant. *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) (J.A. 30); *United States* v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 3, 1970) (J.A. 38). When the Sixth Circuit decided *Keith* in April 1971 —four months after the end of the wiretap in this case—the court noted that the question "ha[d] never been

decided at the appellate level by any court."[18] *United States* v. *United States District Court*, 444 F.2d 651, 656 (6th Cir. 1971) (footnote omitted). The Sixth Circuit held that a warrant was necessary for wiretaps investigating domestic subversion, but Judge Weick filed a strong dissent (444 F.2d at 671-677). And when this Court addressed the question in *Keith*, the Court wrote (407 U.S. at 299) (emphasis added) (footnote omitted):

> The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. *Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definite decision of this Court. This case brings the issue here for the first time.* Its resolution is a matter of national concern * * *.

This language cannot be reconciled with the district court's view that the issue decided in *Keith* had in fact been "clearly established" years before.

Thus far, we have discussed only those cases dealing with the narrow issue of wiretaps used to investigate domestic, as opposed to foreign, threats to national security.[19] Before *Keith*, however, it was not apparent that the difference between these two situations was constitutionally significant. For example, Justice White's concurring opinion in *Katz* stated broadly (389 U.S. at 363) that warrants should not be required in "national

---

[18] At that time, two district courts had held that no warrant was required, and two had held to the contrary. Compare *United States* v. *Dellinger, supra*, and *United States* v. *O'Neal, supra*, with *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Cal. 1971), and the district court decision in *Keith*.

[19] Whether a warrant is constitutionally needed in the latter situation is still unresolved (see *Keith*, 407 U.S. at 321-322 & n.20).

security" cases and drew no distinction between cases involving domestic and foreign subversion. In like manner, Judge Weick's dissent in *Keith* argued (444 F.2d at 674) that warrantless electronic surveillance was equally justified in both situations because "[t]he risk of injury to the Government is just as great whether the attacks are from within or without." Thus petitioner was fully justified in relying on the much larger body of case law supporting the constitutionality of warrantless wiretaps in all types of national security cases. See *Zweibon* v. *Mitchell* (*Zweibon IV*), 720 F.2d 162, 171 (D.C. Cir. 1983), cert. denied, No. 83-2005 (Oct. 9, 1984).[20]

3. With the exception of the district court in the present case, every court that has addressed the question has concluded that the illegality of warrantless domestic security wiretaps was not "clearly established" prior to this Court's decision in *Keith*. In *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1084-1085 (1981), the District of Columbia Circuit held that petitioner did not violate a clearly established standard when he authorized wiretaps that terminated in January 1971, shortly *after* those at issue here. Similarly, in *Zweibon IV*, 720 F.2d at 170, the same court held that "there existed no clearly established warrant or reasonableness requirements" during the period from October 1970 to July 1971. More recently, another district judge in the Eastern District of Pennsylvania has sustained petitioner's claim of immunity in another case involving the Davidon (and one other) wiretap, concluding that "by any fair objective test, at the time the wiretaps in question were authorized by the Attorney General and throughout the entire time that the

---

[20] See, *e.g.*, *United States* v. *Butenko*, 318 F. Supp. 66 (D.N.J. 1970), aff'd, 494 F.2d 593 (3d Cir.), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. 1970), appeal dismissed, 456 F.2d 1112 (5th Cir. 1972) (per curiam), aff'd, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); *United States* v. *Clay*, Cr. No. 6711-94 (S.D. Tex. July 14, 1969), aff'd, 430 F.2d 165 (5th Cir. 1970), rev'd, 403 U.S. 698 (1971).

wiretaps were in place, the law that domestic national security wiretaps authorized by the Attorney General required warrants was not 'clearly established.'" *Burkhart* v. *Saxbe*, 596 F. Supp. 96 (E.D. Pa. 1984) (Pet. App. 149a). Furthermore, the Ninth Circuit has held that the decision in *Keith* was not even "clearly foreshadowed" and thus should not be applied retrospectively. *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978). Obviously, if *Keith* was not "clearly foreshadowed," its holding could not have been "clearly established" law 15 months earlier.

4. The district court's reasons for departing from this body of precedent are insubstantial and reflect a fundamental misunderstanding of both the nature of qualified immunity under *Harlow* and the responsibilities of the Attorney General. First, the court opined (Pet. App. 62a) that "[t]he *Keith* majority opinion reached [its] conclusion with little difficulty because of the clarity of the existing precedents, including the 18th Century opinions of Lord Mansfield." But the test for qualified immunity should not depend on a necessarily impressionistic judgment whether this Court reached its decision in *Keith* with or without "difficulty." The proper test is whether petitioner violated a clearly established rule of law.

The district court next relied (Pet. App. 63a) on a decision of the District of Columbia Circuit holding that *Keith* was "clearly foreshadowed" by earlier cases and should therefore be given retroactive effect. *Zweibon* v. *Mitchell* (*Zweibon III*), 606 F.2d 1172 (D.C. Cir. 1979), cert. denied, 453 U.S. 912 (1981). However, as the District of Columbia Circuit itself recognized in a later opinion in the same case, "the 'clearly established' test for immunity purposes" is not "coterminous with the 'clearly foreshadowed' test courts employ to determine whether a judicial decision ought to be given retroactive effect." *Zweibon IV*, 720 F.2d at 172; see also *id.* at 172-173; *Zweibon III*, 606 F.2d at 1181 n.49. Whether or not a decision of this Court should be given normal retro-

spective effect is a very different issue than the one governed by *Harlow*: whether a government official should be subject to personal monetary liability for policy decisions which when made did not violate any clearly established rights. *Harlow*'s objective test was intended to permit the prompt and sure determination of the issue of qualified immunity; merging that test with the one governing the general question of retroactivity would invite the lower courts "to embrace the exilarating opportunity of anticipating a doctrine which may be in the womb of time." *Spector Motor Service, Inc.* v. *Walsh*, 139 F.2d 809, 823 (2d Cir.) (L. Hand, J., dissenting), judgment vacated and remanded to the district court *sub nom. Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101 (1944).

The district court also relied (Pet. App. 64a-65a) on the general principle enunciated in *Katz* that warrantless searches are constitutional only if they fall within a few recognized exceptions. In so doing the court simply overrode the fact that in *Katz* this Court expressly reserved decision on the question whether national security wiretaps fell into such an exception, and that individual Justices expressed differing views on the subject.[21]

The district court faulted petitioner because "more than one month prior to the Attorney General's authorization of the wiretap at issue in this case" a defense motion filed in the district court proceedings that gave rise to *Keith* should have given "the Justice Department

---

[21] Moreover, by the district court's reasoning, *Katz* must have clearly established that warrantless electronic surveillance is always illegal. Yet in *Keith*, the Court left open the question whether a warrant is constitutionally required for wiretaps used to investigate foreign threats to the national security (407 U.S. at 321-322 & n.20). The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801-1811, was enacted to govern such wiretaps, but the constitutional question remains unresolved. See *Chagnon* v. *Bell*, 642 F.2d 1248, 1257-1261 (D.C. Cir. 1980), cert. denied, 453 U.S. 911 (1981) (former Attorney General Bell entitled to qualified immunity for authorizing warrantless foreign security wiretap in 1977-1978).

* * * reason to know that its position regarding the need for a warrant was subject to both question and attack" (Pet. App. 64a). And if this motion was not enough, the district court continued (Pet. App. 64a), "[a]fter January 25, 1971 [*i.e.*, several weeks after the wiretap in this case ended], the government had overwhelming reason to know that its conduct was unconstitutional" as a result of the district court's decision in *United States* v. *Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971), which granted that motion. The district court also suggested that petitioner was bound to accept the views expressed in Justice Douglas's concurring opinion in *Katz* (and presumably to ignore those expressed in Justice White's concurring opinion). The district court wrote (Pet. App. 66a):

> [I]n 1967, the *Katz* majority opinion and two concurrences should have clearly alerted defendant Mitchell that electronic surveillance such as the Davidon tap was subject to the warrant requirement of the Fourth Amendment. Instead of seeking to obtain a warrant for the Davidon tap, defendant Mitchell and his aides gambled that Justice White's position would be accepted if the Court were to be faced with this issue in an actual case rather than a hypothetical debate. The Justice Department lost that gamble in *Keith*.

We submit that the approach to issues of immunity implicit in this passage not only cannot be reconciled with the policy concerns that animated this Court in *Harlow*, but itself vividly illustrates the mischief that *Harlow* sought to cure. The central *point* of *Harlow* was that difficult and important decisions made by government officials in an environment of legal uncertainty should *not* be transformed into gambling games in which crushing personal liability becomes a cost of making erroneous guesses about how the courts in the future will resolve these uncertainties. And it is absurd to suggest that the Attorney General should require discontinuation

of an investigative technique simply because it has been challenged by a defendant in a criminal case or rejected by a single district court judge. By that reasoning, criminal investigations will come to a halt. See *Zweibon IV*, 720 F.2d at 171. Nor should the Attorney General be required, at the risk of personal liability, to follow individual expressions of views by a minority of this Court, especially where, as in *Katz*, other members of the Court express seemingly contrary views and the Court itself specifically reserves decision on the question.[22] The Attorney General is the nation's chief law enforcement officer. It is his duty to enforce the law vigorously and aggressively, to "strike hard blows" but fair ones, as this Court once put it. *Berger* v. *United States*, 295 U.S. 78, 88 (1935). If the Attorney General risks personal liability whenever he employs an investigative technique that some have brought into question, he will always have a strong incentive to err on the side of inaction. But that is exactly what *Harlow* sought to prevent. Unless it is clearly established that particular conduct is unlawful, the public interest is "better served by action taken 'with independence and without fear of consequences.'" *Harlow* v. *Fitzgerald*, 457 U.S. at 819 (citation omitted).

Finally, the district court held (Pet. App. 67a-69a) that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, should have alerted petitioner that a warrant was required. However, *Keith* itself made abundantly clear that Title III "simply did not legislate with respect to national security surveillances" (407 U.S. at 306). After reviewing the language of Title III, the Court concluded that "Congress simply left presidential powers where it found them" in this field (*id.* at 303). The Court also found that the legislative history supported this interpretation

---

[22] In *Zweibon IV*, the court of appeals similarly rejected the plaintiffs' attempt to "'poll' the Supreme Court Justices on the scope of the national security exemption as of 1970" (720 F.2d at 172).

(*id.* at 306-308). The district court simply ignored *Keith's* lengthy discussion of Title III.[23]

5. If this Court agrees that the denial of qualified immunity is appealable, we urge the Court to decide the merits of the qualified immunity question, rather than remanding that question to the court of appeals. Several factors support such a disposition. Petitioner's entitlement to qualified immunity is, we believe, beyond serious dispute. "The immunity question is a pure issue of law, appropriate for [this Court's] immediate resolution." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982). The issue is simple and straightforward and has already been decided by several courts. Requiring still another lower federal court to address the question is most unlikely to shed any new light on the problem. In addition, if this Court decides in petitioner's favor on the issue of qualified immunity, there would be no need to reach the more difficult question of absolute immunity. At the same time, this meritless litigation, which began more than a decade ago, would be brought to an end. As Judge Weis stated in dissent below (Pet. App. 29a): "This litigation has lasted far too long. It should be terminated now."

II. PETITIONER IS ENTITLED TO ABSOLUTE IMMUNITY FOR DECISIONS MADE TO PROTECT NATIONAL SECURITY

In *Harlow* v. *Fitzgerald*, 457 U.S. at 812, this Court stated:

> For aides entrusted with discretionary authority in such sensitive areas as national security or foreign

---

[23] The district court relied (Pet. App. 68a) on *Zweibon* v. *Mitchell (Zweibon I)*, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976), in which the D.C. Circuit held that Title III does require a warrant for domestic security wiretaps. However, that court has since concluded that *Zweibon I* represented such a "sharp break in the law" that it should be given only prospective effect. *Zweibon III*, 606 F.2d at 1182. Thus, *Zweibon I's* interpretation of Title III, even if correct, would not be binding here.

> policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.

In this case, our remaining submission is that protection of the "unhesitating performance of functions vital to the national interest" requires that the Attorney General have absolute immunity from personal damages liability [24] for decisions—such as the one at issue here—made to protect the national security from threats such as violence, terrorism, subversion, or espionage.[25]

1. We are fully cognizant that claims for absolute immunity come to this Court with a substantial burden of persuasion. The inevitable immediate question is: why is qualified immunity insufficient? After all, by hypothesis absolute immunity seems to come into play only where qualified immunity leaves off—that is, where a government official has been shown to have violated a *clearly established* constitutional or statutory right. What

---

[24] We call to the Court's attention that the factors that make this case a compelling one for absolute immunity may also create a doubt about an antecedent issue: whether a judicially-fashioned cause of action for damages under the Constitution should be recognized at all with respect to the Attorney General's national security decisions. "The Court, in *Bivens* and its progeny, has expressly cautioned * * * that such a remedy will not be available when 'special factors counselling hesitation' are present." *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983), slip op. 2, quoting *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971). See also *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 10; *Carlson* v. *Green*, 446 U.S. 14, 18 (1980); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979). In this case the "special factors" are, of course, those that in the body of our submission support a claim for absolute immunity.

[25] This case involved an intelligence-gathering national security wiretap undertaken primarily in order to *prevent* a threat to the national security from materializing. Thus, this case does not present the question whether a claim of absolute immunity should be recognized in connection with the normal criminal-investigation functions of the Attorney General when the crime relates to national security.

reason can there be for exempting government officials from liability in such a circumstance, where a willful flouting of the law has, by hypothesis, occurred?

Of course, it is the case that these questions arise whenever absolute immunity is claimed; nevertheless, this Court has concluded that absolute immunity should be extended to judges (see *Pierson* v. *Ray*, 386 U.S. 547 (1967)), prosecutors (see *Imbler* v. *Pachtman*, 424 U.S. 409 (1976)), administrative law judges and administrative prosecutors (see *Butz* v. *Economou*, 438 U.S. at 508-517), and the President (see *Nixon* v. *Fitzgerald*, *supra*). In each of these cases, the Court understood that in some circumstances qualified immunity may be insufficient notwithstanding the superficial attractions of the argument that public officials should always be liable for actions that violate clearly established rights.

In fact the story of this case casts a dramatic light on why that argument obscures some fundamental considerations. In this case respondent seeks to make a former Attorney General of the United States personally liable for substantial money damages because that officer—faced with credible information that there might be terrorist attacks on federal facilities and on the person of the senior foreign-policy advisor of the President—determined that an immediate intelligence-gathering telephone tap was in order, and that under the law as it stood at that time he (the President's express designee in this area) did not need judicial permission to order such surveillance. Years later, a federal district judge persuades himself that this difficult question of constitutional law—one that had been expressly reserved by this Court and had divided some of its individual Justices, that had at that time never been passed on by an appellate court and had been unanimously decided the other way at the trial level—had, nevertheless, a "clear" answer (thus illustrating this Court's warning that "[i]n times of political passion, dishonest or vindictive motives are

readily attributed * * * and as readily believed" (*Tenney* v. *Brandhove*, 341 U.S. 367, 378 (1951)). Consequently he rules that the Attorney General violated "clearly established" constitutional rights and should pay compensatory (and perhaps punitive) damages out of his own pocket. The correctness of this ruling is, to be sure, subject to further review—but only (according to the court of appeals) after a full trial on the merits and, thereafter, at the discretion of this Court. In the meantime, according to the courts below (and notwithstanding *Harlow*), petitioner's thoughts and motives in evaluating the advice he received and taking the action he took will be subjected to the hindsight of exacting judicial scrutiny (here in the context of respondent's demand for punitive damages).

The difficulty is clear. From a retrospective viewpoint and in the abstract, there is an all too easy appeal to the assertion that public officials who have deliberately flouted clearly established rights should be liable. But, from the perspective of an official making a decision at the time he is making it—from the prospective viewpoint—things that may seem clear years later, in a wholly different legal and political climate, may not be clear at all. As this case shows, qualified immunity—which at first glance seems to be so precise, so "just"—creates risks and uncertainties of its own. And the question before the Court is: what balance of risks should an official have on his mind *at the time he has to make his decision, in an environment of uncertainty?* Under a regime of qualified immunity, a risk-averse official will be well advised to remember that ruinous personal liability may be the consequence if he guesses wrong, if a decision that now seems imperatively demanded by public policy and warranted by law will come later to be characterized by some federal court as the invasion of what by hindsight is said to be a clearly established legal right. He must also remember that a prolonged and agonizing process of litigation (12 years in this case) may in any event be in

prospect before he can be vindicated.[26] He must remember, too, that with respect to decisions made in the area of national security, he may be unable in the future to put on a complete defense: the information on which he is now relying may relate to matters that he will not be free to disclose in the event of future legal proceedings.[27] In sum, notwithstanding *Harlow*, the chilling effects of possible embroilment in litigation and possible personal liability continue to be substantial features of discretionary decisionmaking even under a regime of qualified immunity.

---

[26] Although *Harlow* sought to avoid this result, we note that some lower courts have suggested that inquiries into a defendant official's subjective motives (which frequently will lead to a trial) still are required in "typical" qualified immunity cases. *Kenyatta* v. *Moore*, 744 F.2d at 1185; see also *id.* at 1185-1186; *Dandridge* v. *Police Dep't*, 566 F. Supp. 152, 160-161 (E.D. Va. 1983); compare *Hobson* v. *Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984) (discussing claims of "unconstitutional motive" after *Harlow*). While this is not the case to address this development, the conclusions reached by the courts in these cases certainly show that, even after *Harlow*, it continues to be "difficult, not only for officials to anticipate the possible legal consequences of their conduct, but also for trial courts to decide even frivolous suits without protracted litigation." *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. at 12 (footnote omitted).

[27] This Court has held that " 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.' " *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146-147 (1982), quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1876). Congress too has recognized the grave problems that may be presented by litigation involving highly sensitive information. See Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801-1803(a) and (b) (creating special court), 1803(c) (creating special security measures); Classified Information Procedures Act (CIPA), 18 U.S.C. App. at 549 *et seq.* (dealing with problem of "graymail"). If the Attorney General does not have absolute immunity in this area, he may be placed in the position of choosing between a ruinous judgment for damages and disclosing confidential information needed for his defense.

2. This Court's cases involving absolute immunity show that the Court has been sensitive to this ex ante perspective. The Court has concluded that in many—indeed most—situations it is desirable for government officials to err on the side of caution before taking actions affecting citizens' constitutional rights, and that the deterrent effect of exposure to possible liability for official misconduct is warranted. *Harlow* v. *Fitzgerald, supra; Butz* v. *Economou, supra.* But this has never been an all-encompassing principle: some officials in some settings should make their decisions without being inhibited and constrained by *private* financial considerations the outcome of which depends on a correct guess as to how the federal courts will, in the distant future, evaluate a past legal environment.

In *Nixon* v. *Fitzgerald, supra,* for example, the Court wrote (457 U.S. at 751-753) (footnotes omitted):

> Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. * * * [The need for immunity] is compelling where the office-holder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. * * * Cognizance of this personal vulnerability frequently could distract a President from his pubic duties, to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve.

In *Harlow* the Court observed (457 U.S. at 812, 814):

> For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.
>
> * * * * *

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty —at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950).

See also *id.* at 812 n.18. Cf. *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983), slip op. 8 ("[T]he need for unhesitating and decisive action by military officers * * * would be undermined" by damages liability); and see *Butz* v. *Economou*, 438 U.S. at 512-513 ("[a]bsolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harrassment or intimidation"); *Imbler* v. *Pachtman*, 424 U.S. at 424 ("public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages"); *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951) (Frankfurter, J.) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good. * * * The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial * * *.").

The need to view immunity questions from the perspective of the official who must make critical decisions with the potential for personal damages liability in mind was perhaps best expressed by Judge Learned Hand (*Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. * * * As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

And this Court, in citing Judge Hand's reasoning in *Nixon* (457 U.S. at 752 n.32) stated that "the prospect that damages liability may render an official unduly cautious in the discharge of his official duties" is "[a]mong the most persuasive reasons supporting official immunity." [28]

3. We submit that the need for "unhesitating" action by the Attorney General to protect the national security justifies absolute immunity in this limited sphere. The compelling public policy that demands this protection is not based on abstract notions but is grounded in "our con-

---

[28] Surprisingly, the court of appeals in *Forsyth I* concluded that this Court was "unconcerned with this problem" (Pet. App. 101a) when *Butz* v. *Economou* was decided (but see 438 U.S. at 512, 515-516) and found, in *Forsyth II*, that nothing in *Nixon* or *Harlow* warranted reconsideration of its earlier immunity decision (Pet. App. 12a-13a). See also *Harlow* v. *Fitzgerald*, 457 U.S. at 814 n.23 (noting that "[t]he importance of this consideration hardly needs emphasis").

stitutional heritage and structure" (*Harlow* v. *Fitzgerald*, 457 U.S. at 813 n.20),[29] which confirm the critical importance of the President's national security responsibilities. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981), quoting *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964). The President has "the fundamental duty, under Art. II, § 1 of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means." *Keith*, 407 U.S. at 310. The Court has stressed the need for "the utmost deference to Presidential responsibilities" in performing the central duties imposed by Article II (*United States* v. *Nixon*, 418 U.S. 683, 710 (1974)).[30] Indeed, in *Harlow* (457 U.S. at 811, 812 n.19) this Court acknowledged that, while "[t]he undifferentiated extension of absolute 'derivative' immunity to the President's aides" could not be justified, "a derivative claim to Presidential immunity would be

---

[29] See also *Nixon* v. *Fitzgerald*, 457 U.S. at 748 n.26 ("Although the Court in *Butz* v. *Economou*, *supra*, at 508, described the requisite inquiry as one of 'public policy,' the focus of inquiry more accurately may be viewed in terms of the 'inherent' or 'structural' assumptions of our scheme of government.").

[30] See, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280 (sustaining Secretary of State's discretion in revoking a passport on the ground that the holder's activities threatened serious danger to United States' foreign policy and national security); *Weinberger* v. *Catholic Action*, 454 U.S. 139 (1981) (concluding that Navy was not required to prepare an Environmental Impact Statement with regard to the operation of a facility capable of storing nuclear weapons because an EIS would compromise national security); *United States* v. *Reynolds*, 345 U.S. 1 (1953) (recognizing the absolute nature of a governmental claim of state secrets privilege); see also *Halkin* v. *Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (holding that courts should accord the "utmost deference" to executive claims of state secrets privilege).

strongest in such 'central' Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own."[31] And in suggesting that absolute immunity "might well be justified" to protect the "unhesitating performance of [national security] functions" (*id.* at 812), this Court made specific reference to the Attorney General's role in authorizing the national security surveillance that is involved in this case (*id.* at 812 n.19).

The Attorney General is the Cabinet officer principally responsible for taking preventive action to protect the national security against terrorism and other threats within our borders. He must approve any procedures for the collection, retention, or dissemination of intelligence information on United States citizens, resident aliens, groups, or companies. Exec. Order No. 12,333, para. 2.3, 3 C.F.R. 211 (1981). He has been delegated the sole power to approve warrantless arrests, searches, or seizures directed against a foreign power or its agents in situations where a warrant would normally be required for law enforcement purposes (*id.* para. 2.5), and was the President's express designee for authorizing national security wiretaps. See Memorandum for the Heads of Executive Departments and Agencies, dated June 30, 1965, *reprinted in United States* v. *United States District Court*, 444 F.2d at 670-671. The Federal Bureau of Investigation, an agency of the Department of Justice (28 U.S.C. 531), is the agency that has been designated "to take charge of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters" (28 C.F.R. 0.85(d)). In addition, with a few limited exceptions, the FBI is

---

[31] It might be noted that President Nixon's immunity from suits seeking damages for warrantless wiretapping has been recognized. *Halperin* v. *Kissinger*, 578 F. Supp. 231, 233 (D.D.C. 1984) (an appeal in this case has been filed but does not challenge the Presidential immunity holding).

also the only agency authorized to gather intelligence information within this country (Exec. Order No. 12,333, para. 2.3(e)), 3 C.F.R. 211 (1981). Finally, the Attorney General, alone among cabinet officers, has the added responsibility of deciding, as the President's chief legal representative, which of the responses available to combat a national security threat fall within the President's powers under the Constitution (see 28 U.S.C. 511-513).[32]

In the critically important and sensitive field of national security, the balance of competing considerations weighs in favor of absolute immunity from damages liability for the Attorney General.[33] The day is long past

---

[32] This responsibility is itself grounded in the Constitution and reflects the historically central role of the Attorney General, dating from the creation of that office in the First Judiciary Act of 1789 (Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 92). This role of the Attorney General is highly important, particularly where the scope of the President's constitutional obligations is unclear, because the President cannot look to the Judicial Branch for advice. This principle was established early on, when Chief Justice Jay declined a request of President Washington. Citing the President's power under Article II to "require the Opinion, in writing, of the principal Officer in each of the executive Departments" (U.S. Const. Art. II, § 2, Cl. 1), the Chief Justice explained:

> [The lines of separation drawn by the Constitution between the three departments of government] being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

3 H. Johnston, *The Correspondence and Public Papers of John Jay* 488-489 (1891).

[33] It is our submission that the Attorney General is entitled to absolute immunity for actions taken to protect national security because he acts on behalf of the President in exercising a wide discretionary authority in this field. We are not contending that the same considerations would necessarily support absolute immunity for lower level officials with more restricted and less important responsibilities in this field.

when the possibility of acts of violence and terrorism directed at the nation's government and leadership can be easily dismissed; and the potential consequences of inaction are too great to permit personal financial considerations (and other consequences of protracted litigation) to interfere with the vigorous and unhesitating performance of the Attorney General's duties. The factors that led this Court to conclude that Cabinet and other executive officers do not enjoy blanket absolute immunity simply do not apply in this specialized area. It is one thing for an executive officer to pause and assess his potential liability when performing the routine functions of his agency—*e.g.*, revoking the registration of a commodities futures trading company (*Butz* v. *Economou*, *supra*) or discharging a subordinate government employee (*Harlow* v. *Fitzgerald*, *supra*). It is quite another thing for the Attorney General to dwell on such personal considerations when dealing with a national security threat.

In the present case petitioner was confronted with a plot to blow up important federal facilities. More ominously, he was faced with a threat to kidnap Henry Kissinger, who, as Assistant to the President for National Security Affairs, was a principal advisor to the President on defense and foreign affairs matters, and who was then conducting secret negotiations to end the war in Vietnam. (What was in question was both Mr. Kissinger's safety and also the possible compromising of highly sensitive security and diplomatic information.) The need for prompt and decisive preventive action was clear. Petitioner concluded that a warrantless telephone tap would be lawful. Our contention is that, in such a context, to subject him to the incremental deterrent effects of possible burdensome litigation and potential heavy personal liability would be undesirable and counterproductive.

4. Is it a serious objection to absolute immunity in this context that it would make the Attorney General

unaccountable even for actions that are wholly egregious? Would a rule of absolute immunity in the national security area encourage our Attorneys General to rush to do violence to our citizens' constitutional rights? We do not believe so.

First, immunity from personal damages actions is not the equivalent of immunity from all legal, political and personal consequences; liability for damages is not the only (or even most effective) deterrent to willful official misconduct.[34] Injunctive and declaratory judgment actions may be brought; evidence seized illegally and in bad faith may be suppressed or excluded from evidence. Congressional inquiry and oversight, dismissal from office, impeachment, and criminal prosecution are all available, and, in the case of an officer such as the Attorney General, not to be lightly discounted. Public and press criticism and political retribution are also powerful deterrents against flagrant abuses.[35]

More important, even, are the many personal, psychological and ethical constraints that animate the vast majority of our public officers. Most of our executive officials are no more minded to engage in purposeful violations of the Constitution and egregious invasions of our citizens' privacies than are our legislators or judges. Deterring the occasional malevolent official is important;

---

[34] See T. Madden & N. Allard, *Advice on Official Liability and Immunity, reprinted in* 2 Administrative Conference of the United States, *Recommendations and Report—1982*, at 209 ("[M]ost observers today agree that [the existing system of civil sanctions for official misconduct] fails to serve two of its primary goals—measured deterrence of official misconduct, and adequate compensation of the victims of such misconduct.")

[35] Moreover, the Attorney General, like the prosecutor in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) and the agency attorney in *Butz* v. *Economou*, 438 U.S. at 515-517, "stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amendability to professional discipline by an association of his peers" (424 U.S. at 429).

but to create systems of deterrence that in turn will constrain and hamper our conscientious and law abiding ones when they are acting in a context that involves the safety and security of our country's leaders and institutions would be tragic.

5. The Court has already held that the Attorney General is absolutely immune from damages liability when he performs the function of a prosecutor. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). The Court observed (*id.* at 424-425) that "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages" (*Imbler* v. *Pachtman*, 424 U.S. 409, 424-425 (1976)). The Court also noted (*id.* at 430-431 & n.33) the difficulty of drawing the line between prosecutorial responsibilities, for which absolute immunity is extended, and "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer," for which only qualified immunity may be available.

We submit that the Attorney General's vital responsibilities in connection with intelligence gathering and prevention in the field of national security are at least as deserving of absolute immunity as routine prosecutorial actions taken either by the Attorney General himself or by subordinate officials.[36] When the Attorney General is called upon to take action to protect the security of the Nation, he should think only of the national good and not about his pocketbook. Accordingly, absolute immunity is appropriate in this limited area.

---

[36] We note that this court has recognized the different interests that inhere in national security intelligence gathering (as distinguished from criminal investigations), where "the emphasis * * * is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency" (*Keith*, 407 U.S. at 322).

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be dismissed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

BARBARA L. HERWIG
GORDON W. DAIGER
LARRY L. GREGG
Attorneys

DECEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10121